No. 15140

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERTHA TATUM,

Appellant,

vs.

OSCAR TATUM, VAI GENE TATUM, and RUBY FAY JOHNSON,

Appellees.

APPELLANT'S OPENING BRIEF.

ARTHUR N. GREENBERG,
1200 C. C. Chapman Building,
756 South Broadway,
Los Angeles 14, California,
Attorney for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Jurisdictional Statement.

This is an appeal from a judgment entered in favor of Appellees on February 4, 1956, by the United States District Court for the Southern District of California, Central Division [Tr. p. 65]. Notice of Appeal was filed on March 16, 1956 [Tr. p. 68].

The instant action arose under the Federal Employees Group Life Insurance Act of 1954, 5 U. S. C., Sections 2091-2103.

The action was originally brought against the United States of America and Metropolitan Life Insurance Company, a corporation. Appellant, at the time of commencement of this action, was a citizen of California and Metropolitan Life Insurance Company was a corporation authorized and existing under and by virtue of the laws of the State of New York [Tr. pp. 1, 10].

Metropolitan Life Insurance Company filed its answer and counterclaim for interpleader on July 11, 1955, naming Appellees as defendants in said counterclaim [Tr. pp. 10-23]. On September 9, 1955, the Trial Court entered an order dismissing the United States from said action [Tr. p. 42].

5 U. S. C., Section 2103, provides that the District Court has original jurisdiction concurrent with the Court of Claims of any civil action against the United States founded upon the Federal Employees Group Life Insurance Act.

An appeal from a final judgment of the District Court to the Court of Appeals is authorized by the provisions of 28 U. S. C., Section 1291.

Nature of the Action.

On August 29, 1954, Metropolitan Life Insurance Company issued group policy No. 17000-G to the United States Civil Service Commission, providing life insurance benefits for certain federal employees including Erwin Tatum, who was then employed by the United States Post Office. Erwin was insured in the amount of $4,000.00 upon his life, and in the additional amount of $4,000.00 in the event of accidental death.

Erwin died by accidental means on December 7, 1954. Thereafter, Metropolitan Life Insurance Company deposited the sum of $8,000.00 in the registry of said District Court pending determination of the instant action.

The group insurance policy provided that:

> "Any amount of group life insurance and group accidental death insurance in force on any employee at the date of his death shall be paid, upon the estab-

lishment of a valid claim therefor, to the person or persons surviving at the date of his death, in the following order of precedence:

"First, to the beneficiary or beneficiaries as the employee may have designated by a writing received by the employing office prior to death.

"Second, if there be no such beneficiary, to the widow or widower of such employee.

"Third, if none of the above, to the child or children of such employee and decedents of deceased children by representation."

See: 5 U. S. C., Sec. 2093.

Erwin failed to designate a beneficiary. Appellant claims the proceeds of said insurance policy as Erwin's widow. Appellees claim said proceeds as Erwin's surviving children.

Statement of the Case.

A. The Ceremonial Marriage Between Erwin and Appellant.

On May 19, 1943, Erwin and Appellant secured a marriage license in Yavaipai County, Arizona, and entered into a ceremonial marriage at Prescott, Arizona, before the Rev. Homer Green, the regular minister of the Church of God in Prescott. Rev. Green, who was at that time recognized in the community as a regularly ordained minister, signed the marriage certificate and had authority under Arizona law to perform said marriage ceremony [Pltf. Ex. 1; Plaintiff's Request for Admissions; Tr. pp. 43, 128, 163].

Before entering into said marriage, Erwin told Appellant that he was divorced from his first wife [Tr. p. 79]. Appellant believed him [Tr. p. 203].

B. Relationship Between Erwin and Appellant.

Erwin was in the United States Army between November 12, 1941 and September 4, 1945 [Pltf. Ex. 3; Tr. p. 161].

On November 12, 1941, Erwin filed a Report of Induction of Selective Serviceman, in which he stated that he was divorced. After the ceremonial marriage with Appellant, Erwin signed new Army beneficiary forms, enlisted man forms, and National Service Life Insurance forms, in which he stated that Appellant was his wife [Pltf. Ex. 3; Tr. pp. 160-161].

During this period, Appellant applied for a military allotment which was refused because Appellant failed to produce Erwin's divorce decree with reference to his earlier marriage [Tr. p. 204].

In his Army discharge papers, Erwin gave his address as that of Appellant and returned there directly after separation from military service [Pltf. Ex. 3; Tr. pp. 160-161, 164].

Thereafter, Erwin and Appellant cohabited together and held themselves out to the community as husband and wife [Pltf. Ex. 15; Tr. pp. 184-185, 213].

Among other things, they filed joint income tax returns, [Pltf. Ex. 7; Tr. pp. 171-172]; Appellant signed a promissory note as Erwin's wife [Pltf. Ex. 8; Tr. p. 172]; they received rent receipts made out to Mr. and Mrs. Tatum [Pltf. Ex. 9; Tr. pp. 172-173]; they took out fire insurance in both of their names [Pltf. Ex. 10; Tr. pp. 173-174]; they mailed Christmas cards on which their signatures were printed as Erwin and Bertha Tatum [Pltf. Ex. 11; Tr. pp. 174-175]; Erwin addressed letters to Appellant as "My Dear Wife" [Pltf. Ex. 5; Tr. p. 169];

Erwin and Appellant received mail addressed to them as Mr. and Mrs. Erwin Tatum [Pltf. Ex. 6; Tr. pp. 170-171]; Erwin named Appellant as his wife and beneficiary in an insurance policy taken out with Golden State Mutual Life Insurance Company [Pltf. Ex. 14; Tr. p. 184]; and Appellant named Erwin as her husband and beneficiary in an insurance policy taken out with Prudential Life Insurance Company [Tr. p. 169].

Appellee Oscar Tatum admitted that Erwin and Appellant behaved in his presence as husband and wife and that he believed that they were married [Tr. p. 153].

Counsel for Appellees admitted in open court that Erwin and Appellant lived together in Los Angeles as husband and wife [Tr. p. 176].

Motion picture actor, Eugene Kelly, who had employed Erwin and Appellant between 1946 and 1950, testified by way of deposition, that an employment agency informed him in 1946 that they were married. During the period of their employment nothing occurred which made Mr. Kelly believe that they were not married. In Mr. Kelly's presence, they were introduced as husband and wife and they introduced each other in the same manner. Their community reputation was that of husband and wife. They lived in one room in the Kelly residence. Appellant washed and ironed Erwin's clothes, took care of Erwin when he was sick, cooked for Erwin and did all that a wife would do for her husband [Pltf. Ex. 15; Tr. p. 213]. This testimony was confirmed by Miss Patricia McClellan, Mr. Kelly's secretary [Tr. p. 213].

Erwin's death certificate stated that Appellant was Erwin's widow [Pltf. Ex. 2; Tr. p. 129].

C. Mattie Tatum.

Mattie Tatum testified that she married Erwin in Texas on January 4, 1927, and lived with him until August, 1935 [Tr. pp. 133, 147]. Thereafter she saw or heard from Erwin at least once a year [Tr. pp. 147-148]. Appellees are the children of Erwin and Mattie.

In 1938, Mattie filed for divorce against Erwin in Smith County, Texas. However, Mattie testified that she did not obtain a divorce decree at that time [Tr. p. 149].

Although Mattie did not live with Erwin after 1935, she collected his military allotment [Tr. pp. 149-150].

In 1948, one of Erwin's daughters died in Texas. Erwin went to the funeral where he again saw Mattie. Thereafter Erwin and Mattie returned to California where they lived together from May until September 1948 [Tr. pp. 138-139].

Mattie testified that she was never served with any divorce papers before October 1948 [Tr. p. 144].

On September 3, 1948, Mattie commenced an action for divorce against Erwin in the Superior Court of the State of California, in and for the County of Los Angeles. On October 23, 1949, an interlocutory judgment of divorce was granted to Mattie by default. The final judgment of divorce was entered on November 30, 1949.

In connection with said action, Erwin and Mattie executed a property settlement agreement which stated in part as follows:

> "This agreement made this 7th day of October, 1948, at and in the City of Los Angeles, County of Los Angeles, State of California, by and between Mattie W. Tatum, also known as Minnie W. Tatum,

hereinafter referred to as the wife, and Erwin Tatum, hereinafter referred to as the husband:

"Witnesseth:

"That whereas the husband and wife are now separated and living separate and apart and there is now pending a suit for divorce in the Superior Court of the County of Los Angeles, State of California, being case number D-367319, and entitled Minnie W. Tatum versus Erwin Tatum; and whereas the parties herein are desirous, for all time, to settle any and all questions of property rights that now exist and to provide for the support of their minor child, Val Gene Tatum . . ."

Said property settlement agreement was not incorporated in the interlocutory decree of divorce [Deft. Ex. A; Tr. pp. 132-133].

D. Relationship of Erwin and Mattie.

No evidence was offered establishing whether Mattie and Erwin had the capacity to intermarry on January 4, 1927, or whether the person who purported to marry them had authority to perform the ceremony. There is no evidence in the record that Erwin did not obtain a divorce from Mattie after their separation in 1935 and before his ceremonial marriage to Appellant on May 19, 1953.

E. Relationship of Erwin and Appellant in Texas.

Erwin and Appellant resided in Fort Worth, Texas, for three to four weeks in each of the years between 1949 and 1954 after Mattie's divorce became final [Pltf. Ex. 15; Tr. pp. 165, 213].

Counsel for Appellees admitted in open court that there was no dispute that Erwin and Appellant went on trips together to Texas [Tr. p. 177].

Erwin sought employment in the Post Office at Fort Worth during some of these years and Erwin and Appellant intended to domicile in Texas. J. C. Johnson, Post Office Superintendent, testified that Erwin told him of Erwin's intention to obtain such employment in Texas [Tr. pp. 164-166, 210].

During their stay in Texas, Erwin and Appellant lived together, registered in motels under the name of Mr. and Mrs. Erwin Tatum, introduced each other as husband and wife [Tr. pp. 167-169], and received mail addressed to them as Mr. and Mrs. Erwin Tatum [Pltf. Ex. 6; Tr. p. 171].

While in Texas, Erwin and Appellant discussed their relationship in light of Mattie's 1949 divorce. Appellant told Erwin that it was time for them to "fix this over." Erwin answered that there was no need because he was already married to Appellant in Texas and that he was her husband. Appellant agreed [Tr. pp. 166-167, 200-201]. The parties believed they were married after Mattie's divorce became final [Tr. pp. 8, 205-206].

Erwin held Appellant out as his wife in both California and Texas. Appellant believed Erwin when he told her that they were husband and wife under Texas law [Tr. pp. 184-185, 209].

Issues Presented.

The issue presented by this appeal is whether Appellant is entitled to the proceeds of a federal employees group life insurance policy on the life of Erwin Tatum, deceased, by virtue of being his widow under a ceremonial, common law or putative marriage.

The legal issues are as follows:

1. Ceremonial Marriage.

Where a ceremonial marriage would be valid except for the alleged incapacity of one of the parties to enter into such contract because of an alleged preexisting marriage:

(a) Is said subsequent marriage valid as a matter of law in the absence of evidence that the parties to the alleged preexisting marriage did not secure a divorce or annulment thereof, and

(b) Is said subsequent marriage valid as a matter of law in the absence of evidence that the parties to the alleged preexisting marriage had the capacity to enter into said preexisting marriage?

(c) Does a divorce in the preexisting marriage, obtained after the subsequent marriage, establish that the parties to the alleged preexisting marriage merely are no longer husband and wife and not that they were validly married at the time of said divorce?

2. Common Law Marriage.

Do California domiciliaries who celebrated a ceremonial marriage, invalid because of an impediment of a preexisting marriage of one of the parties, contract a valid Texas common law marriage recognizable in California after removal of the impediment where there is cohabitation and holding out as husband and wife in Texas?

3. Putative Marriage.

Is a woman who contracts a ceremonial marriage in good faith and in ignorance of any impediment to the validity thereof entitled to the proceeds of a federal employees group life insurance policy as the putative spouse of the insured?

ARGUMENT.

I.

Appellant Is Entitled to the Insurance Proceeds on the Life of Erwin Tatum, Deceased, Because She Is the Widow of Said Insured by Virtue of the Ceremonial Marriage Entered Into on May 19, 1943.

A. The Ceremonial Marriage Between Erwin and Appellant.

On May 19, 1943, Erwin and Appellant secured a marriage license in Yavaipai County, Arizona, a certified and authenticated copy thereof was received in evidence as Plaintiff's Exhibit 1 [Tr. p. 128]. Thereafter, the parties entered into a ceremonial marriage at Prescott, Arizona, before the Rev. Homer Green, a regular minister of the Church of God in Prescott. Rev. Green had authority under Arizona law to perform the marriage [Request for Admissions under Rule 36; Tr. p. 43].

Thus, under Arizona law, the marriage between Erwin and Appellant was valid.

5 Ariz. Code, Secs. 63-101, 103, 111.

The validity of the marriage was established by the certified and authenticated copy of the marriage certificate combined with Appellees' Admissions regarding the signature of Rev. Green and his authority to perform the ceremony.

People v. Ledoux, 1909, 155 Cal. 535, 550, 102 Pac. 517;

People v. Jordan, 1925, 72 Cal. App. 406, 408, 237 Pac. 757;

Cal. Code Civ. Proc., Sec. 1948.

B. Presumption of Validity of Ceremonial Marriage Between Erwin and Appellant.

Mattie testified that she married Erwin in Texas on January 4, 1927.

However, the presumption is that Erwin's subsequent ceremonial marriage to Appellant was valid and that any prior marriage to Mattie was dissolved by death or divorce. The burden was upon Appellees to rebut this presumption.

Briggs v. United States, 90 Fed. Supp. 135 (Ct. Cl. 1950);

Birch v. Birch, 1955, 136 Cal. App. 2d 615, 289 P. 2d 53;

Hamrick v. Hamrick, 1953, 119 Cal. App. 2d 839, 260 P. 2d 188;

Gainey v. Gainey, 1953, 119 Cal. App. 2d 564, 259 P. 2d 984;

Sanders v. Sanders, 1938, 52 Ariz. 156, 79 P. 2d 523;

Kolombatovich v. Magna Copper Co., 1934, 43 Ariz. 314, 318, 30 P. 2d 832;

McCord v. McCord, 1911, 13 Ariz. 377, 114 Pac. 968.

In *Estate of Smith,* 1949, 33 Cal. 2d 279, 281, 201 P. 2d 539, the California Supreme Court held as follows:

> "It is well established that when a person has entered into two successive marriages, a presumption arises in favor of the validity of the second marriage, and the burden is upon the party attacking the validity of the second marriage to prove that the first marriage had not been dissolved by the death of a spouse or by divorce or had not been annulled at the time of the second marriage."

In *Kalombatovich v. Magna Copper Co., supra,* the Arizona Supreme Court stated on page 318 as follows:

> "Where one contracts a second marriage during the lifetime of the first spouse, the presumption that the first marriage was legally dissolved prevails and the one who asserts that the second marriage is invalid has the burden of showing that there has been no divorce."

A marriage valid where contracted is valid everywhere. The law of the place of contracting governs validity of marriage.

Estate of Perez, 1950, 98 Cal. App. 2d 121, 219 P. 2d 35;

Cal. Civ. Code, Sec. 63.

Under both California and Arizona law, the ceremonial marriage between Erwin and Appellant is presumed to be valid.

C. Burden of Proof Necessary to Rebut Presumption of Validity of Subsequent Marriage.

The law of the forum governs evidentiary rules, burden of proof, and presumptions and inferences to be drawn from the evidence. Thus, California evidentiary rules are applicable.

Hamlet v. Hook, 1951, 106 Cal. App. 2d 791, 236 P. 2d 196;

Restatement of Conflict of Laws, Sec. 595;

11 *Cal. Jur.* 2d 201.

If either Erwin or Appellant lacked the capacity to enter into the 1943 ceremonial marriage because of a preexisting valid marriage, then such party would be guilty of the crime of bigamy.

However, the presumption that a person is innocent of crime is one of the strongest known to law.

Cal. Code Civ. Proc., Sec. 1963;

People v. Shorts, 1948, 32 Cal. 2d 502, 507, 197 P. 2d 330;

Hunter v. Hunter, 1896, 111 Cal. 261, 267, 43 Pac. 756.

Accordingly, the California Supreme Court stated in *Hunter v. Hunter, supra,* on page 267, as follows:

> "It is presumed that a person is innocent of crime and wrong. (Code Civ. Proc., sec. 1963). There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years, or where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce."

Although this is the accepted doctrine, the Trial Court announced a contrary rule throughout the trial maintaining that once an earlier marriage was established, the burden shifted to Appellant to prove the validity of her subsequent marriage to Erwin. The Trial Court stated:

> "I think if you establish a prior marriage then the burden shifts. A marriage once consummated is presumed to continue until there is some evidence of termination." [Tr. p. 142], and

> "The Court: But as a *prima facie* case he is resting his case upon a ceremonial marriage in Arizona. You have already introduced evidence that there was a prior marriage.

Mr. Ross: That is correct, your Honor.

The Court: He can't be married to two people at the same time.

Mr. Ross: No, but I understand there is this presumption of innocence which I have to overcome.

The Court: This is not a criminal trial." [Tr. p. 143].

The Trial Court obviously ignored the general rule that the subsequent marriage is presumed valid and in order to rebut the presumption of validity, the attacking party must prove no divorce or annulment of the prior marriage in any state in which the parties to the prior marriage resided.

Bancroft v. Bancroft, 1935, 9 Cal. App. 2d 464, 50 P. 2d 465;

Marsh v. Marsh, 1926, 79 Cal. App. 560, 568, 250 Pac. 411;

Estate of Smith, 1949, 33 Cal. 2d 279, 201 P. 2d 539;

Estate of Winder, 1950, 98 Cal. App. 2d 78, 86, 219 P. 2d 18;

Mazzenga v. Rosso, 1948, 87 Cal. App. 2d 790, 792, 197 P. 2d 710;

Estate of Borneman, 1939, 35 Cal. App. 2d 455, 460, 96 P. 2d 182.

There is no evidence that Erwin failed to obtain a divorce in the states where he resided between 1927 and 1943. Mattie testified that she did not procure such divorce. But the failure of Mattie to have obtained such

divorce was not sufficient to overcome the presumption of validity of the second marriage.

Estate of Borneman, 1939, 35 Cal. App. 2d 455, 460, 96 P. 2d 182;

Kalombatovich v. Magna Copper Co., 1934, 43 Ariz. 314, 320, 30 P. 2d 832;

McCord v. McCord, 1911, 13 Ariz. 377, 114 Pac. 968.

In *Bancroft v. Bancroft,* 1935, 9 Cal. App. 2d 464, 50 P. 2d 465, the Court stated at pages 469 and 470 as follows:

> ". . . it is not sufficient for the party asserting the validity of the first marriage to prove that she had not obtained a divorce and had not been served with process in a divorce action brought by her husband. In order to overcome the presumption she must not only prove those facts but must prove that her husband was not granted a divorce in any of the jurisdictions in which he resided prior to the second marriage."

On the other hand, the evidence clearly established that Erwin obtained a divorce prior to his ceremonial marriage to Appellant.

See Statement of the Case, B. Relationship of the Parties, *supra.*

Accordingly, as a matter of law, the Court must presume that the marriage between Erwin and Appellant was valid. This the Trial Court failed to do and thus committed prejudicial error.

D. Validity of Marriage Between Mattie and Erwin.

In any event, the marriage between Erwin and Appellant could be void only if Mattie and Erwin themselves had the capacity to contract a valid marriage in 1927. The question thus arises as to whether there was a prior valid marriage between Mattie and Irwin. The burden of proving the validity of the alleged prior marriage was upon Appellees.

Briggs v. United States, 90 Fed. Supp. 135, 142 (Ct. Cl. 1950);

United States v. Green, 98 Fed. 63, 65 (S. D. Ia., 1899);

Fuqway v. State, 1927, Ala. A. 243, 114 So. 892, 894;

Keller v. Linsenmeyer, 1927, 101 N. J. Eq. 664, 139 Atl. 33, 38;

In re Capraros Estate, 1934, 116 N. J. Eq. 259, 172 Atl. 907, 908;

Johanessen v. Johanessen, 1911, 70 Misc. 361, 128 N. Y. Supp. 892, 896;

In re Deforeas Estate, 1926, 119 Or. 556, 249 Pac. 632, 634;

Routledge v. Githens, 1926, 118 Or. 70, 245 Pac. 1072.

However, Appellees offered no evidence to establish the validity of the alleged prior marriage.

Furthermore, although a certified copy of the marriage license between Mattie and Erwin was received in evidence, there was no proof of the signature of the person

by whom it purports to have been signed and of his authority to perform the marriage ceremony.

The marriage certificate did not prove itself. Without proof of the signature of the person by whom it purports to have been signed and of his authority to perform the marriage ceremony, it did not prove a marriage between Mattie and Erwin.

People v. Le Doux, 1901, 155 Cal. 535, 550, 102 Pac. 517;

People v. Jordan, 1925, 72 Cal. App. 406, 408, 237 Pac. 757;

Cal. Code Civ. Proc., Sec. 1948.

Too much is at stake to vitiate a ceremonial marriage without a strong showing. Ceremonial marriage, the pillar of our social structure, is carefully protected by the law. Property rights, legitimation of children, and community reputation are based upon ceremonial marriage. Thus, the burden has always been upon the attacking party to establish by a great *quantum* of evidence the invalidity of the last ceremonial marriage in point of time.

Since there is no evidence in the record that the 1927 marriage between Mattie and Erwin was valid, the Court, as a matter of law, must hold the subsequent marriage to be binding. However, the Trial Court found that at the time of the marriage between Erwin and Appellant, there was a subsisting, undissolved marriage between Erwin and Mattie [Tr. p. 58]. This was clearly prejudicial error.

E. Effect of Mattie's 1949 Divorce.

The evidence was undisputed that Mattie obtained a final judgment of divorce from Erwin on November 30, 1949.

The Trial Court stated that the divorce decree established as a matter of law that Mattie and Erwin were legally husband and wife at that time, stating:

> "There has been introduced here a decree of divorce and I think the only inference the court can take at this time is that when the decree of divorce was entered they were husband and wife.
>
> "I had a case recently involving an entirely different point, but at that time I came to the conclusion that a decree of divorce between two people in the State of California I would have to recognize because a decree of divorce could not be granted unless the relationship of husband and wife existed." [Tr. p. 144].

However, a divorce decree is not *res judicata* against third persons and does not establish the validity or existence of a prior marriage. The decree merely establishes that the parties are not thereafter husband and wife.

Rediker v. Rediker, 1950, 35 Cal. 2d 796, 221 P. 2d 1;

Watson v. Watson, 1952, 39 Cal. 2d 305, 246 P. 2d 19;

Hunter v. Hunter, 1896, 111 Cal. 261, 43 Pac. 756;

Briggs v. United States, 90 Fed. Supp. 135 (Ct. Cl. 1950).

In *Rediker v. Rediker, supra,* the Court stated as follows in pages 800-801:

> "It is an oversimplification to state that a divorce proceeding is a proceeding *in rem,* and to proceed from that statement to the assumption that a decree entered therein is *res adjudicata* in an action between a party and a stranger thereto, not only as to the subsequent status of the parties with relation to each other, but also as to all issues decided or that might have been decided in the proceeding. The weight of authority holds that a decree of divorce is a judgment *in rem* only to the extent that it adjudicates the future status of the parties in relation to each other. (Williams vs. North Carolina, 317 U. S. 387, 298 (63 S. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273); Williams vs. North Carolina, 325 U. S. 226, 232 (65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366) . . . As between strangers or strangers and parties. however, the decree is *res judicata* only in that it conclusively determines that the parties are thereafter free to remarry so far as any relation to each other is concerned. *It does not establish the previous validity of their marriage against third persons who were not and had no right to be heard thereon.* (2 Freeman, Judgments, Sec. 910, p. 1913; 3 Freeman, Judgments Sec. 1524, pp. 3131-3132; Restatement, Judgments, Sec. 74, p. 335; Hunter v. Hunter, 111 Cal. 261, 266 (43 P. 756, 52 Am. St. Rep. 180, 31 L. R. A. 411); Estate of James, 99 Cal. 374, 379 (33 P. 1122, 37 Am. St. Rep. 60)."

Thus, Mattie's divorce decree merely established that Mattie and Erwin were no longer husband and wife. It did not establish that they were legally married at the time of the decree or at any other time.

Accordingly, Appellees failed to rebut the presumption of validity of the 1943 ceremonial marriage between Erwin and Appellant and the court must hold, as a matter of law, that Appellant is the widow of Erwin and therefore entitled to his insurance proceeds.

II.

Appellant Is Entitled to the Insurance Proceeds on the Life of Erwin Tatum, Deceased, as the Widow of Said Insured by Virtue of a Texas Common Law Marriage Entered Into Subsequent to the 1949 Divorce Between Mattie and Erwin.

The evidence was undisputed that Erwin and Appellant resided in Texas for periods of time between 1949 and 1954, subsequent to the time that Mattie's divorce became final [Tr. pp. 165, 177, 213]; that Erwin sought employment at the Post Office in Fort Worth, Texas, during some of said years [Tr. pp. 164-166, 210]; and that while in Texas, Erwin and Appellant cohabited and held themselves out to the public as husband and wife [Tr. pp. 167-171]. The Trial Court so found [Tr. p. 59]. In addition, Erwin and Appellant believed that they were married while they were in Texas [Tr. pp. 184-185, 209].

The Trial Court raised the question of whether a California resident visiting Texas for the purpose of securing employment could consummate a valid common law marriage which would be recognized on return to California [Tr. pp. 178-179, 204-206]. In short, the issue is whether a Texas domicile is a prerequisite to a Texas common law marriage.

Domicile or residence is *not* one of the prerequisites to a Texas common law marriage. A Texas common law marriage occurs where there is cohabitation and holding out to the community as husband and wife in Texas.

Ray v. Thompson, 1953, 261 S. W. 2d 195;

Baker v. Mays & Mays, 1947, 199 S. W. 2d 279;

Hill v. Smith, 1944, 181 S. W. 2d 1015;

28 Tex. Jur. 716.

A single act of publicly holding forth as husband and wife in Texas, followed by a like holding forth in other states, is sufficient to constitute a common law marriage.

Estate of McKanna, 1951, 106 Cal. App. 2d 126, 234 P. 2d 673;

Bobbitt v. Bobbitt, 1920, 223 S. W. 478.

It has been expressly held that neither domicile nor residence is a prerequisite to common law marriage.

Estate of McKanna, 1951, 106 Cal. App. 2d 126, 234 P. 2d 673;

Bobbitt v. Bobbitt, 1920, 223 S. W. 478;

Shea v. Shea, 1945, 294 N. Y. 909;

Hynes v. McDermott, 1883, 91 N. Y. 451.

In *Estate of McKanna,* 1951, 106 Cal. App. 2d 126, 234 P. 2d 673, a California domiciliary visited Texas on a combination business and pleasure trip. While there, he met a woman with whom he lived as husband and wife for approximately three weeks. They returned to California where they resided until the husband's death, except for occasional visits elsewhere. The issue in the *McKanna* case was identical to the issue in the instant

case, to wit: was there a valid Texas common law marriage celebrated during the short stay in Texas. The Court stated on pages 131 and 132, as follows:

> "Notwithstanding what has so far been said, appellant contends that there is a further essential to the validity of a common law marriage in Texas, *i.e.*, that the parties be domiciled in the State at the time of the alleged agreement to marry, or that at the time there was an intention to acquire a domicile in the state. In view of the fact that there is no such requirement to a ceremonial marriage in Texas, and the constant reiteration by its courts that there are at most only three essentials to a common law marriage in Texas, of which essentials domicile is never referred to, we see no merit in the contention."

It might be added, that in the instant action, the parties had the intention of domiciling in Texas. [Tr. p. 166.]

Although the Trial Court found both cohabitation and holding out as husband and wife, it also found that there was no express agreement to be husband and wife. [Tr. p. 60.]

However, as a matter of law, Erwin and Appellant became husband and wife in Texas after Mattie's final decree was entered. Under Texas law an invalid marriage contracted in good faith, and followed by cohabitation as husband and wife, after removal of the impediment, creates a valid Texas common law marriage.

> *Curtin v. State,* 1950, 155 Tex. Cr. 625, 238 S. W. 2d 187;
>
> *Consolidated Underwriters v. Kelly,* 1929, 15 S. W. 2d 229, 300 S. W. 981.

In *Curtin v. State, supra,* wife married husband in 1931, upon his representation that he was divorced. In

1934, wife discovered that husband had misrepresented his earlier divorce. Wife continued living with husband. Husband finally obtained a divorce from his first wife in 1938. Wife lived with husband until 1949. Wife testified and the Court found that there was never any agreement concerning the marriage. The Court held that the removal of the impediment created a common law marriage in Texas as a matter of law, stating on page 192 as follows:

> "There are many different conditions that would allow a putative marriage to ripen into a legitimate union of the parties . . . The doctrine that an invalid marriage contracted in good faith, followed by cohabitation as husband and wife after the removal of the impediment to the marriage, constitutes a valid common law marriage has been applied where the impediment to the marriage was a subsisting marriage of one of the parties, and such marriage was terminated by death or divorce . . . The doctrine applies whether the initial marriage was a ceremonial or an informal, common law marriage, although a ceremonial marriage has been held to be significant as indicating that the parties intended a matrimonial, and not a meretricious relationship."

See also:

Utterback v. Utterback, 71 Fed. Supp. 231 (D. C., 1947).

Moreover, under such circumstances, domicile is not a requirement of establishing a Texas common law marriage. In *Estate of McKanna,* 1951, 106 Cal. App. 2d 126, 234 P. 2d 673, the Court stated on page 133 as follows:

> "In short, domicile is an aid but not a prerequisite to sustain the claim of the common law marriage in

> Texas where the original contract of marriage was invalid."

Accordingly, since the impediment was removed, Erwin and Appellant became common law husband and wife in Texas after 1949 as a matter of law.

Moreover, the burden was not upon Appellant to prove an express agreement to become husband and wife. An implied agreement is sufficient and is found from cohabitation and holding out to the community as such.

> *Estate of McKanna,* 1951, 106 Cal. App. 2d 126, 234 P. 2d 673;
>
> *Consolidated Underwriters v. Kelly,* 1929, 15 S. W. 2d 229, 300 S. W. 981;
>
> *Ray v. Thompson,* 1953, 261 S. W. 2d 195.

In *Ray v. Thompson, supra,* the Court stated on page 196 as follows:

> ". . . It may be conceded that the appellees could not prove that there had been an express agreement to marry . . . no such burden was upon them, since—as it is well settled by our authorities—such an agreement may be implied from cohabitation and holding out to the community that the spouses were living together as husband and wife."

A common law marriage is as valid as a ceremonial marriage and is recognized as such in California. The surviving wife of a common law marriage is the legal widow and is entitled to all rights of a legal widow.

> *Colbert v. Colbert,* 1946, 28 Cal. 2d 276, 280, 169 P. 2d 633;
>
> *McDonald v. McDonald,* 1936, 6 Cal. 2d 457, 58 P. 2d 163;
>
> *Cal. Civ. Code,* Sec. 63.

Thus, even if the ceremonial marriage was invalid, Erwin and Appellant became common law husband and wife after Mattie's decree became final as a matter of law, and Appellant is entitled to the insurance proceeds as Erwin's common law widow. The findings of the Trial Court on this issue constituted prejudicial error.

III.

Appellant Is Entitled to the Insurance Proceeds on the Life of Erwin Tatum, Deceased, as the Putative Spouse of Said Insured.

Regardless of whether Appellant was Erwin's lawful widow, there is no question but that at the time of the marriage ceremony of May 19, 1943, Appellant acted in good faith. Moreover, Erwin and Appellant resided together as husband and wife in California during the time that premiums were paid for said insurance.

The Trial Court concluded as a matter of law that Appellant was not entitled to the status of putative spouse [Tr. p. 61]. This was clearly contrary to the evidence.

The basic element of a putative marriage is the good faith belief in a valid marriage.

> *Vallera v. Vallera,* 1943, 21 Cal. 2d 681, 684, 134 P. 2d 761.

The evidence clearly established that Appellant believed that she was Erwin's wife after the 1943 ceremonial marriage and after Mattie's 1949 divorce. Thus, at least she should be found to be Erwin's putative spouse.

A woman residing with a man as his wife in California in the good faith belief that a valid marriage exists, is entitled upon termination of the relationship to share in the property acquired by them during its existence.

> *Vallera v. Vallera,* 1943, 21 Cal. 2d 681, 684, 134 P. 2d 761.

The putative spouse inherits the entire estate of a putative union upon the death of her husband intestate.

Estate of Krone, 1948, 83 Cal. App. 2d 766, 769, 189 P. 2d 741;

Union Bank & Trust Co. v. Gordon, 1953, 166 Cal. App. 2d 681, 254 P. 2d 644;

Mazzenga v. Rosso, 1948, 87 Cal. App. 2d 790, 197 P. 2d 770.

The proceeds of an insurance policy on the life of a husband are community property to the extent that the premiums were paid with community funds and belong to the surviving putative spouse.

Estate of Foy, 1952, 109 Cal. App. 2d 329, 240 P. 2d 685;

Travelers Insurance Co. v. Sancher, 1933, 219 Cal. 351, 353, 26 P. 2d 482;

Dixon Insurance Co. v. Peacock, 1933, 217 Cal. 415, 418, 19 P. 2d 233.

However, the Trial Court concluded as a matter of law that the term "widow" employed in the provision of the policy and in 5 U. S. C., Section 2093, meant lawful and not putative widow. [Tr. p. 61.]

In *Moore Drydock Company v. Pillsbury,* 169 F. 2d 988 (9th Cir., 1948), this Court interpreted the term "widow" as the equivalent of the term "surviving wife," in construction of the Longshoremen's and Harbor Workers' Compensation Act. Such definition would be equally appropriate in connection with the Federal Employees Group Life Insurance Act.

California Probate Code, Section 201, provides that upon the death of either husband or wife, intestate, the entire community property goes to the "surviving spouse."

In *Estate of Krone,* 1948, 83 Cal. App. 2d 766, 189 P. 2d 741, the question arose as to whether a putative wife was the "surviving spouse" under Probate Code, Section 201, and entitled to inherit the entire community estate upon the death of her putative husband intestate. The Court held that the surviving putative wife inherited the entire community estate upon death of her husband intestate.

It is true that the term "widow" in connection with the National Service Life Insurance Act, has been held to mean the "lawful wife" of a serviceman.

Muir v. United States, 93 Fed. Supp. 939 (N. D. Cal., 1950).

However, the rules applicable to interpretation of the National Service Life Insurance Act are not equally effective with reference to the Federal Employee's Group Life Insurance Act.

Federal employee's group life insurance is additional compensation given to federal employees. The United States Government pays part of the cost of the insurance. As such, the group insurance is one of the fringe benefits constituting part of the salary of federal employees.

See:

5 U. S. C., Sec. 2094(b).

If this compensation was in any form other than group life insurance, there would be no question but that such compensation would be community property and subject to the rules set forth in *Estate of Krone, supra.* There is no reason to distinguish between forms of earnings. All earnings received during marriage are community

property, in which both the legal and putative wife have an interest. The logical and equitable interpretation of the Federal Employee's Group Life Insurance Act would be to hold that the group insurance was a form of earnings paid to the federal employees. As such, the earnings are governed by applicable state law. In this case, Appellant, as putative widow of Erwin, is entitled to said earnings. Accordingly, Appellant is entitled to the proceeds of said insurance.

See:

Speedling v. Hobby, 132 Fed. Supp. 833 (N. D. Cal., 1955).

Conclusion.

After living with Erwin for thirteen years and ministering to his needs in the husband and wife relationship, Appellant at least has an equitable claim to the proceeds of said life insurance.

Fortunately, in this case, the law affords to Appellant the equitable remedy. Under the facts and law of this case, Appellant is entitled to said proceeds as the legal (ceremonial or common law) or putative widow of Erwin. The Court of Appeals should so order.

Respectfully submitted,

ARTHUR N. GREENBERG,

Attorney for Appellant.